may file with the Board his objections, if any, to such interrogatories, together with any cross-interrogatories he desires to propose. If he file cross-interrogatories, they shall be filed with the Board in triplicate and one copy thereof will be forwarded to the opposite party, or his counsel, who shall within 10 days thereafter file his objections, if any, to such cross-interrogatories. No objections to the interrogatories or cross-interrogatories will be considered at the hearing unless taken before the order for the taking of the deposition issues.

When a deposition is taken upon written interrogatories and cross-interrogatories neither the counsel for the taxpayer nor for the Commissioner, nor any person other than the witness, a stenographic reporter and the officer taking the deposition shall be present at the examination of the witness, which fact shall be certified by the officer taking the deposition who shall in such case propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness's own words.

Depositions obtained in foreign countries must be taken on written interrogatories.

RULE 50.—SETTLEMENT OF FINAL DETERMINATION [1]

When the Board determines the issues in any proceeding and withholds final decision of the deficiency or overpayment for later computation, the parties shall, if they are in agreement as to the amount of the deficiency or overpayment, in accordance with the determination of the Board, file with the Board an original and four copies of a computation showing the amount for entry of final decision forthwith. If the parties are not in agreement as to the amount to be entered in the final decision, either of them may file with the Board a computation of the deficiency or overpayment believed by him to be in accordance with the determination of the Board. The clerk will serve a copy thereof upon the opposite party and will thereupon place the matter upon the day calendar for hearing in due course and give the usual notice. If the opposite party fails to file objection, accompanied by an alternative computation, within 5 days prior to the date of such hearing, or any continuance thereof, the deficiency or overpayment shown in the computation already submitted shall be taken to be correct and decision thereon will be entered. If the parties submit different computations and amounts, they will be afforded an opportunity to be heard thereon on the date fixed, and the Board will determine the correct deficiency or overpayment and enter final decision.

Any hearing under this rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no

[1] Amended Apr. 28, 1928.

argument will be heard upon or consideration given to the issues or matters already disposed of by such determination or of any new issues. This rule is not to be regarded as affording an opportunity for rehearing or reconsideration.

RULE 51.—COSTS—PREPARATION OF RECORD ON REVIEW[1]

It shall be the duty of the clerk, immediately after the contents of a record on review have been settled or agreed to, to notify the petitioner of the costs and charges for the preparation, comparison and certification of said record; such charges to be determined in accordance with the provisions of an Act of Congress entitled "An Act to provide fees to be charged by clerks of the district courts of the United States," approved February 11, 1925, 43 Stat. 857–8.

No transcript will be certified and transmitted to the appellate court until the costs and charges therefor have been paid to the Board.

RULE 52.—COSTS—PRINTING OF RECORD ON REVIEW[2]

In each proceeding for review of a decision of the Board by the United States Circuit Court of Appeals for the Second Circuit when review is sought by the Commissioner of Internal Revenue, the clerk of the Board shall, immediately after the contents of the record on review, as required by Rule 35 of the Court, have been settled or agreed upon, make available to the Commissioner, or his counsel, the record of the Board in the proceeding. The Commissioner shall cause the record to be printed. Sixteen copies of the printed record shall be delivered to the clerk of this Board for certification and filing with the clerk of the Circuit Court of Appeals. The clerk of the Board shall serve five copies of the printed record upon counsel for the taxpayer by registered mail.

RULE 60.—FEES AND MILEAGE

The following is from the Revenue Act of 1926:

"SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

---

[1] Adopted July 2, 1927.

[2] Adopted Dec. 6, 1927.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926."

No witness, other than one for the Commissioner, shall be required to testify in any proceeding before this Board until he shall have been tendered the fees and mileage to which he is entitled in accordance with the above provision of law.

RULE 61.—COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS

When the time prescribed by these rules for doing any act expires on a Sunday or a legal holiday in the District of Columbia, such time shall extend to and include the next succeeding day that is not a Sunday or such a legal holiday: *Provided*, That when the time for performing any act is prescribed by statute nothing in these rules shall be deemed to be a limitation or extension of the statutory time fixed.

The following-named days are legal holidays within the District of Columbia:

New Year's Day, January 1 (Sec. 993, Revised Stat. relating to D. C.).

Washington's Birthday, February 22 (Act of January 31, 1879).

Inauguration Day, every fourth year (Act of June 18, 1888).

Decoration Day, May 30 (Act of August 1, 1888).

Fourth of July (Sec. 993, Revised Stat. relating to D. C.).

Labor Day, first Monday in September (Act of June 28, 1894).

Thanksgiving Day, day proclaimed by President (Sec. 993, Revised Stat. relating to D. C.).

Christmas Day, December 25 (Sec. 993, Revised Stat. relating to D. C.).

When legal holidays fall on Sunday the next day shall be a holiday (Act of December 20, 1881).

RULE 62.—SPECIAL ASSESSMENT[1]

(*a*) If some of the issues raised by the petition involve section 327 or section 328 of the Revenue Act of 1918 or of 1921 (or section 210 of the Revenue Act of 1917, as the case may be), and some do not involve such sections, the hearing may, in the discretion of the Board, on motion, be limited in the first instance to trial of the issues which do not involve such sections.

[1] Adopted Dec. 28, 1927.

(*b*) After decision on such other issues, or if no such other issues are raised by the pleadings, a hearing may, in the discretion of the Board, on motion, be had, limited to the trial of the issue whether the petitioner is entitled to have its tax determined as provided in section 328 (or section 210 as the case may be).

(*c*) If the Board decides that the petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), the respondent shall within 60 days after such decision file with the Board an original and four copies of a proposed redetermination showing the basis and method of the computation. If, within 20 days after service by the Board upon the petitioner of a copy of such proposed redetermination, the parties are unable to agree upon the amount of tax, either party may move, or the Board may upon its own motion order, that the case be placed upon the day calender for further hearing, at which either party may submit proof of the correct amount of tax and deficiency or overpayment.

(*d*) If from the pleadings or otherwise it appears of record before the Board that the parties agree that petitioner is entitled to have its tax determined as provided in section 328 (or section 210, as the case may be), and the only issue is as to the correct amount of the tax so determined, the case will be placed upon the day calender in due course for hearing, at which either party may submit proof of the correct amount of the tax and deficiency or overpayment.

APPENDIX

FORMS

These forms are subject to amendment as circumstances may render necessary.

No. 1. Application for admission to practice.
No. 2. Petition.
No. 3. Application for subpœna.
No. 4. Subpœna.
No. 5. Application for order to take depositions.
No. 6. Order to take depositions and certificate on return.

(NOTE.—Read Rule 4 of the Rules of Practice of the Board and carefully observe the requirements thereof as to form, size, and style of papers.)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE

(See Rule 2)

UNITED STATES BOARD OF TAX APPEALS

APPLICATION FOR ADMISSION TO PRACTICE

I, _____, hereby apply for admission to practice before the United States Board of Tax Appeals, and submit the following:

1. I reside at _____ (Street number), _____ (City), _____ (County), _____ (State).

2. My office address is _____ (Street number), _____ (City), _____ (County), _____ (State).

3. I was admitted to the bar of the _____ (Enter name of highest court) Court, of the State of _____, on the _____ day of _____ 192__, and have never been suspended or disbarred from practice before said court or any court of any State or the United States, except as follows: _____

4. I am a member (or associate) of the firm _____.

5. I am a member of _____ (State membership in professional societies)

No. 1.—APPLICATION FOR ADMISSION TO PRACTICE—Continued

Certified Public Accountants will use the following:

I was issued a certificate and authorized to practice as a certified public accountant by the _____ of the State of _____
(Give name of board or commission)
on the _____ day of _____, 192__, and such certificate has never been revoked nor have I been suspended from practice, except as follows:

_____

_____

_____

I am a member of _____
(State names of accountants' societies to which you belong)

_____

_____

and have never been suspended or expelled from any such society or any other recognized society of certified public accountants, except as follows:

_____

_____

_____
(Name of applicant)

STATE OF _____ }
County of _____ } *ss:*

_____, being first duly sworn, says that he is the person named in the foregoing application for admission to practice before the United States Board of Tax Appeals and that the statements of fact therein contained are true.

_____
(Signature of applicant)

Subscribed and sworn to before me this _____ day of _____, 192__.

_____

_____

CERTIFICATE

I, _____
(State whether clerk of court or secretary of State board or commission of accountancy)
hereby certify that _____, the applicant for admission to practice before the United States Board of Tax Appeals, is duly admitted to practice as _____ by the
(State whether attorney or C. P. A.)
_____ of the State of
(State name of court or State board or commission of accountancy)
_____ and that he is now in good standing as such
_____
(State whether attorney or C. P. A.)

_____
(Clerk of court or secretary of State board or commission of accountancy)

Dated _____, 192__.

[SEAL.]

No. 2.—PETITION

(See Rules 4, 5, 6, 7, and 8)

UNITED STATES BOARD OF TAX APPEALS

Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. ----------

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols) dated ----------, 192--, and as a basis of his proceeding alleges as follows:

1. The petitioner is (set forth whether individual, corporation, fiduciary, etc., as provided in Rule 6) with principal office (or residence) at ---------- (Street) ----------, ---------- (City) (State).

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on ----------, 192--.

3. The taxes in controversy are (income, profits, estate, or gift) taxes for the (calendar or fiscal) year 19--- and for ---------- dollars (state as exactly as possible the amount in dispute).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors: (Enumerate specifically the assignments of error in a concise manner and avoid pleading facts which properly belong in the succeeding paragraph.)

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows: (Here set forth allegations of the facts relied upon—but not the evidence—in orderly and logical sequence, with subparagraphs lettered, so as fully to inform the Board of the issues to be presented and to enable the Commissioner to admit or deny each specific allegation.)

Wherefore, the petitioner prays that this Board may hear the proceeding and (here state the relief desired).

Counsel for Petitioner,

(Post-office address)

STATE OF ----------
County of ---------- } *ss:*

----------, being duly sworn, says that he is the petitioner (if a corporation, or fiduciary, state title of office or trust of person verifying and that he is duly authorized to verify the foregoing petition) above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

Subscribed and sworn to before me this---------- day of----------, 192---.

No. 3.—APPLICATION FOR SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

----------,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

APPLICATION FOR SUBPŒNA

To the United States Board of Tax Appeals:

Application is hereby made for the issuance of a subpœna for the attendance before ----------
(The United States Board of Tax Appeals, or the name
----
and official title of the person authorized to take depositions)
at ---------- of the following persons whose oral testimony is desired on behalf of ---------- in the matter of
(Petitioner or respondent)
the tax liability of the above-named petitioner now pending on appeal:

NAME	ADDRESS
----------	----------
----------	----------
----------	----------
----------	----------
----------	----------

Details required under Rule 44:

Dated ----------, 192...

(Signed) ----------

No. 4.—SUBPŒNA

(See Rule 44)

UNITED STATES BOARD OF TAX APPEALS

----------,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. ----------

SUBPŒNA

The President of the United States of America:

To ---------- Greeting.

You are hereby commanded under penalty of law to be and appear in your proper person before the ----------
(United States Board of Tax Appeals
----
or the name and official title of the person authorized to take depositions)

No. 4.—SUBPŒNA—Continued

at _____ on the _____ day of _____, 192__,
at _____ o'clock ____ m., then and there to testify on behalf of
_____ in the matter of the tax liability of _____
(Petitioner or respondent)
now pending before this Board.

You are required to bring with you the following, to wit: _____
_____
_____
_____
_____

By order of the United States Board of Tax Appeals, this _____ day of _____, 192__.

[SEAL.]

_____
(Member)

PROOF OF SERVICE

STATE OF _____ }
County of _____ } *ss:*

_____, being first and duly sworn, says:—I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding in which this subpœna was issued.

That on the _____ day of _____, 192__, I served the annexed subpœna on the following witnesses named therein at the places set opposite their respective names, by delivering to and leaving with each of them personally a copy of said subpœna and at the same time exhibiting to each of them this original:

NAME	PLACE OF SERVICE
_____	_____
_____	_____
_____	_____
_____	_____

(For witnesses subpœnaed on behalf of petitioner.)

That at the time of such service I tendered to each of said witnesses the sum of $ _____, the same being the fees and mileage required by Rule 60 of the Rules of Practice of the Board.

_____

Subscribed and sworn to before me
this _____ day of _____, 192__.

_____

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS

(See Rules 45, 46, and 47)

UNITED STATES BOARD OF TAX APPEALS

----------, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. ----------

APPLICATION FOR ORDER TO TAKE DEPOSITIONS

To the United States Board of Tax Appeals:

1. Application is hereby made by the above-named ----------
(Petitioner or respondent)
for an order to take the deposition__ of the following-named person__:

	NAME OF WITNESS	POST-OFFICE ADDRESS
(a)	----------	----------
(b)	----------	----------
(c)	----------	----------
(d)	----------	----------

2. It is desired to take the depositions of the persons above named and each of them for the following reasons:

(a) ----------will testify to the following materia matters: ----------

(Set forth briefly the matter upon which said witness will be called to testify)

(b) ----------will testify to the following materia matters: ----------

(c) ----------will testify to the following materia matters: ----------

(d) ----------will testify to the following materia matters: ----------

3. The reasons why ---------- desires to take the
(Petitioner or respondent)
testimony of the above-named persons rather than have them appear personally and testify before the Board are as follows: (State specifically reasons for each witness for whom subpœna is required.)

4. It is desired to take the testimony of ----------
(Names of witnesses)

on the ---------- day of ----------, 192__, at the hour of ------ o'clock ---- m.
(A date sufficiently in advance of the day set for hearing of the proceedings to enable the deposition to be completed and filed with the Board at least 10 days prior to the hearing)

before ---------- in the City of ----------
(State name and title of official)

State of ---------- at Room ----------
(Give number of room, street number, and name of building.)

No. 5.—APPLICATION FOR ORDER TO TAKE DEPOSITIONS—Continued

5. That _____ is a
(Name of official before whom depositions are to be taken)
_____, who has no office connection or business employ-
(Give official title)
ment with the petitioner or his counsel.

Dated _____, 192__.

_____
Counsel for Petitioner.

STATE OF _____ }
County of _____ } *ss:*

_____, being duly sworn, says that the foregoing
(Petitioner or counsel)
application for order to take depositions is made in good faith and for the reasons therein stated and that the same is not made for purposes of delay.

_____

Subscribed and sworn to before me this
_____ day of _____, 192__.

_____

No. 6.—ORDER TO TAKE DEPOSITIONS

(See Rule 45)

UNITED STATES BOARD OF TAX APPEALS

_____
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE
Respondent.
} Docket No. _____

ORDER TO TAKE DEPOSITIONS

On consideration of the application of _____ to take
(Petitioner or respondent)
the testimony by deposition of _____
(Names of witnesses)
_____
residing at _____, alleged to be material witnesses
in this proceeding, at _____
(Room number, street number, and place)
_____ on the _____ day of _____, 192__,
at ____ o'clock __ m., and it appearing therefrom that _____
a _____ of _____ is a person
(Official title) (Address)
authorized to administer oaths under the Revenue Act of 1926, it is by the Board:

ORDERED, that the depositions of the said witnesses above named be taken at _____
(Room number, street number, and place)
_____ commencing on the _____ day of _____, 192__,
at ____ o'clock __ m.

And it is further ORDERED, That the said depositions be taken before _____ of _____, a _____
(Official title)
who is hereby designated by the Board for that purpose.

No. 6.—ORDER TO TAKE DEPOSITIONS—Continued

The said depositions shall be taken and the same returned to this Board in accordance with the rules of the Board.

_____
(Member, United States Board of Tax Appeals)

Dated _____, 192__.
[SEAL.]

CERTIFICATE ON RETURN

(See Rule 46)

I, _____, the person named in the foregoing order to take depositions, hereby certify:

1. I proceeded, on the _____ day of _____, A. D. 192__, at the office of _____, in the city of _____, State of _____, at _____ o'clock, __ m., under the said order and in the presence of _____ and _____, the counsel of the respective parties, to take the following depositions, viz:

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

_____, a witness produced on behalf of the _____.
(Petitioner or respondent)

That said witness ____ were examined under oath at such times and places as conditions of adjournment required, and that the testimony of said witness __ (or their answers to the interrogatories filed) was taken stenographically and reduced to typewriting by me or under my direction.

2. I further certify that after the said testimony of said witness ____ was reduced to writing the transcript of the testimony was read and signed by said witness ____ in my presence, and that _____ acknowledged
(Each of them or he)
before me that said testimony was in all respects truly and correctly transcribed.

3. I further certify that, after the signing of the deposition in my presence, no alterations or changes were made therein.

4. I have no office connection or business employment with the petitioner or his attorney except that of _____, objection to which was waived
(State connection)
by both the parties to the proceeding.

[SEAL.]

_____
(Signature of person taking deposition)

_____
(Official title)

(NOTE.—This Certificate on Return, when properly executed, and also the Order to Take Depositions, should be attached to and bound with the transcript, preceding the first page thereof. It should then be inclosed in a sealed envelope and addressed to United States Board of Tax Appeals, Earle Building, Washington, D. C. See Rules 45 and 46 of the Rules of Practice and Procedure of the Board as to specific requirements for taking depositions.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 130.

OLD COLONY TRUST COMPANY, ET AL., *Executors,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION OF W. A. SUTHERLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

W. A. SUTHERLAND,
Counsel, Amicus Curiae.

SUTHERLAND & TUTTLE,
JOSEPH B. BRENNAN,
Of Counsel.

PEARSON'S, 919 ELEVENTH STREET NORTHWEST

IN THE

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OLD COLONY TRUST COMPANY, ET AL., *Executors,*

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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please The Court:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

W. A. SUTHERLAND,
Counsel, Amicus Curiae.

SUBJECT NDEX.

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IN THE

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MOTION OF W. A. SUTHERLAND FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

We represent a taxpayer whose case was appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926. The hearing was had and decision rendered after the passage of the 1926 Act. The decision was against the taxpayer and the case was appealed to the Cir-

cuit Court of Appeals. The Circuit Court of Appeals rendered judgment sustaining the Board's decision on the ground that taxpayer had not introduced sufficient evidence to sustain its contentions. Petition was made to this court for certiorari and certiorari was denied. Our interest lies in showing that the Circuit Court of Appeals does not have jurisdiction in this class of cases because its judgment does not preclude the taxpayer from claiming a refund and suing therefor, and does not preclude the Commissioner of Internal Revenue—an Executive Officer—from voluntarily granting a refund.

We address ourselves, therefore, to a partial answer to the Court's first question propounded on February 18, 1929:

> "Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?"

Our answer to this question relates only to cases appealed to the Board of Tax Appeals prior to the passage of the 1926 Act and in which hearing was had and decision rendered after the passage of the 1926 Act.

We regret that we were called into this matter so late that we have not been able to make the exhaustive research of the authorities, especially as relates to certain broad constitutional questions, which the Court's inquiry in this case presents an opportunity to develop. However, our answer does not require a consideration of these questions. It rests on statutory construction. The only constitutional questions which it involves are beyond dispute. If the Court should, in view of the vast importance of the question, at any time desire a reargument of the matter, we trust that we may be given permission to file another brief going into these other questions.

II.

STATUTES INVOLVED.

The pertinent portions of the Revenue Acts of 1924 and 1926 are set forth in the first supplemental brief of the Commissioner of Internal Revenue. It is unnecessary, therefore, again to set forth these statutes.

III.

ARGUMENT.

Summary of Argument.

1. We concede for purposes of this brief that the Circuit Court of Appeals does have jurisdiction of appeals from the Board of Tax Appeals in cases appealed to the Board subsequent to the passage of the Revenue Act of 1926.

2. The Circuit Court of Appeals does not have jurisdiction of cases appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, if its judgment may be upset by executive action in allowing claim for refund based upon the same cause of action or by the judgment of another court in an action on a rejected claim for refund.

3. In cases filed with the Board of Tax Appeals prior to the passage of the Revenue Act of 1926, that Act expressly reserves to taxpayer the right to file claim for refund and, if it is rejected, to bring suit thereon, notwithstanding the decision of the Board of Tax Appeals and affirmance by the Circuit Court of Appeals.

4. If the Circuit Court of Appeals' decision were final, it would in many cases be possible for the Commissioner of Internal Revenue to deprive taxpayer of the right to

file claim for refund and sue thereon, in spite of the express guarantee of this right contained in the Revenue Act of 1926.

1. We concede for purposes of this brief that the Circuit Court of Appeals does have jurisdiction of appeals from the Board of Tax Appeals in cases appealed to the board subsequent to the passage of the Revenue Act of 1926.

We agree with the argument in the American Bar Association brief with reference to the constitutionality of the provisions giving jurisdiction to the Circuit Court of Appeals to review decisions of the Board of Tax Appeals in cases filed with the Board subsequent to the passage of the 1926 Act. There the judgment of the Board is final unless appeal is taken to the Circuit Court of Appeals, and the judgment of the Circuit Court of Appeals is final unless certiorari is granted by this court. The Commissioner does not have authority to allow a refund of taxes contrary to the decision of the Board, or if the case is appealed, contrary to the decision of the Court. Nor can the taxpayer in such a situation maintain suit for refund. Under such circumstances the jurisdiction of the Circuit Court of Appeals should certainly be sustained if this Court is to continue to permit appeals from the Federal Trade Commission and the Secretary of Agriculture and the Board of General Appraisers and the like.

The situation where the appeal to the Board of Tax Appeals is taken prior to the passage of the 1926 Act is entirely different.

2. The Circuit Court of Appeals does not have jurisdiction of cases appealed to the Board of Tax Appeals prior to the passage of the Revenue Act of 1926 if its judgment may be upset by executive

ACTION IN ALLOWING CLAIM FOR REFUND BASED UPON THE SAME CAUSE OF ACTION OR BY THE JUDGMENT OF ANOTHER COURT IN AN ACTION ON A REJECTED CLAIM FOR REFUND.

If the judgment of the Circuit Court of Appeals upon appeal from the Board of Tax Appeals is not conclusive of the rights of the parties so that no change can be made in these rights by an executive officer of the Government or by a court in a suit upon a rejected claim for refund, the Circuit Court of Appeals is without jurisdiction. As a matter of constitutional law we do not feel that this requires the citation of authority. The Committee of the American Bar Association in its first brief as amici curiae, attempting to sustain jurisdiction of the Circuit Court of Appeals, make it perfectly clear that they do not question this proposition.

See *Hayburn's Case,* 2 Dallas 409n (1792).
U. S. v. *Ferreira,* 13 How. 40 (1851).
Gordon v. *U. S.,* 2 Wall. 561, 117 U. S. 697 (1865).

In order therefore to show that the Circuit Court of Appeals does not have jurisdiction it is necessary only to show that its judgment does not have such finality as will bar a refund by the Commissioner of Internal Revenue or suit therefor by the taxpayer upon the same cause.

3. IN CASES FILED WITH THE BOARD OF TAX APPEALS PRIOR TO THE PASSAGE OF THE REVENUE ACT OF 1926, THAT ACT EXPRESSLY RESERVES TO TAXPAYER THE RIGHT TO FILE CLAIM FOR REFUND AND BRING SUIT THEREON NOTWITHSTANDING THE DECISION OF THE BOARD OF TAX APPEALS AND AFFIRMANCE BY THE CIRCUIT COURT OF APPEALS.

Prior to the passage of the 1926 Act the decision of the Board of Tax Appeals was not binding upon either party. The Commissioner could bring suit in court to recover any

taxes disallowed by the Board and the taxpayer could bring suit in court to recover any amounts found to be due by the Board and paid by the taxpayer, or the Commissioner could refund to the taxpayer without suit. The Boards' findings were only *prima faice* evidence. The result was that when a taxpayer appealed to the Board of Tax Appeals he did not surrender the right always preserved to him by the Revenue Acts of the United States—even though not required by the Constitution—to file suit against the collector in the district court and have a jury trial on all issues of fact. The Commissioner, if he lost, could bring a suit *de novo* in the District Court.

When Congress came to enact the Revenue Act of 1926 it had come to feel that there was unnecessary duplication of effort where a case was tried, according to legal procedure, in the Board of Tax Apeals and then tried over again in an action in the District Court brought by the losing party. It therefore provided that no claim for refund should ever be filed if the taxpayer, within the sixty days after the receipt from the Commissioner of the notice giving him the right to go to the Board of Tax Appeals, filed appeal with the Board of Tax Appeals. It is not necessary that the case ever be heard. Even if the petition is voluntarily withdrawn by the taxpayer, his rights to a judicial determination of his tax liability is forever barred.

Congress felt it was necessary to provide specially for cases in which the petition was filed before the 1926 Act and the hearing had and the decision rendered thereafter. It might have treated these cases just as it treated those cases in which the hearing was had before the passage of the 1926 Act, leaving the taxpayer and the Commissioner without right of appeal, just as under the 1924 Act. It might have provided that the decision of the Board was final and barred refund and that an appeal was the only remedy. It might possibly have provided that though the decision of

the Board of Tax Appeals was not final, the case could be appealed to the Circuit Court of Appeals and its decision would be final, though there is some doubt as to the constitutionality of such a provision. Congress did not do either of these things, but provided that the only remedy of the Commissioner is by appeal, if he is dissatisfied with the decision, and that the tapayer may appeal or not, as he chooses, but provided that in any event the taxpayer shall not be barred from filing claim for refund. That is tantamount to saying that the decision of the Circuit Court of Appeals is not final; and, as stated above, Congress could not constitutionally provide for an appeal to the Circuit Court of Appeals where that Courts' decision is subject to administrative review, or to be upset by suit upon a rejected claim for refund.

In referring to cases of the character here discussed, Section 283(b) says:

> "In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and *except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.*

Section 284(d)—which appears in that section of the 1926 Act granting to taxpayers the right to file a claim for refund of all income taxes overpaid—is directed to excepting from the provisions of section 284(a) those cases in which appeal to the Board of Tax Appeals shall operate to bar a claim for refund. The exception, by its express terms, is confined to cases where the taxpayer, "after the

enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed."

It is conceded by all that section 283(b) permits the taxpayer, whose petition is filed with the Board prior to the 1926 Act, to file a claim for refund and to sue thereon, though the Board has rendered a decision against him. It has been contended, however, that section 283(b) is to be construed to provide that if the taxpayer then carries the matter to the Circuit Court of Appeals, the decision of that court is final and bars any claim for refund.

It is respectfully submitted that the language of the section 283(b) does not lend itself to any such interpretation. In the same sentence with the provision which preserves the taxpayer's right to a claim for refund in cases appealed to the Board prior to the 1926 Act by excepting them from the provisions of Section 284(d), we find not only a reference to the jurisdiction of the Board but also to the jurisdiction of the reviewing courts. This same sentence which preserves the right to a refund provides for review by the courts, and does not distinguish cases appealed to the courts from those not so appealed. The language of that paragraph clearly considers both the Board and the Court reviewing the Board's decision as forums in which no determination will be reached which will bar a claim for refund.

This section preserves in clear language the right of the taxpayer filing with the Board prior to the 1926 Act to file claim for refund, although he goes to the Board and carries the Board's decision to the courts for review. It is simply a wishful argument which construes it so as not to allow to the taxpayer the right to file claim for refund and bring suit thereon with the attendant advantages of a jury trial. The language makes absolutely no distinction, so far as the right to claim for refund is concerned, between

a case where appeal has been taken to the Circuit Court of Appeals and one where appeal has not been so taken.

Stress is laid, however, upon the provisions of Section 1003(a) of the 1926 Act which provides that the judgment of the Circuit Court of Appeals on review of decisions of the Board shall be "*final,*" except that it shall be subject to review by the Supreme Court of the United States. Great stress is laid upon the use of the word "*final*" in this Section.

It is respectfully submitted that the word "*final*" as there used has no reference to and does not in any way concern itself with the matter as to whether the judgment of the Circuit Court of Appeals shall be "*final*" in the sense that it will bar a claim for refund in the case of a petition filed with the Board of Tax Appeals prior to the 1926 Act. The word "*final*" is used in Section 1005(a) where it clearly has the same meaning which it has in Section 1003(a). By no stretch of the imagination can the use of the word "*final*" in Section 1005(a) be said to contemplate a bar to a suit for refund where the petition was filed with the Board prior to the 1926 Act. Section 1005(a) provides that the decision of the Board shall become "*final*" when the expiration of the time for filing a petition for review is expired. Clearly, if no petition for review were filed in a case such as we are now discussing there would be a right to file a claim for refund. There is then no reason to attribute to the word "*final,*" in Section 1003(a), a meaning which would bar a claim for refund in the class of cases we are discussing.

Of course it could not be argued that the judgment of the Circuit Court of Appeals, in passing upon a decision of the Board, is final for the reason that the matter there determined could not, on ordinary principles of *res adjudicata,* be relitigated in a subsequent proceeding. Such an argument would assume the jurisdiction of the Circuit Court

of Appeals and the finality of its judgment as against any subsequent claim or suit for refund, whereas this is the very point in issue.

The same reply may be made to the possible suggestion that an amount paid by a taxpayer after a judgment of the Circuit Court of Appeals upon review of the Board's decision cannot be considered an *"overpayment"* within the meaning of section 284(a) because it is made in accordance with a final court decision. This argument again assumes the very point in dispute. If the decision is not a bar to a subsequent claim for refund, it does not prevent a payment from being an *"overpayment"* if it is in excess of the tax properly due.

It is urged in one of the briefs filed with this Court that the exception from the operation of Section 284 (b) contained in Section 283 (b), applies only to issues not actually raised before the Board. But, according to our understanding, it is true (as the author concedes) that all cases heard after the 1926 Act are heard and decided *under exactly the same procedure and on exactly the same basis*, as cases filed after the 1926 Act. We understand that the total tax liability for the year is in issue as much in cases *heard* after the 1926 Act as in those *filed* after the 1926 Act. In all cases *filed* after the 1926 Act all issues with reference to the year's taxes must be raised or the matter becomes *res judicata* just as if they had been raised. What reason is there for saying that Section 283(b) is to be so construed as to relieve from the principle of *res judicata* as to those issues which might have been raised and were not, but does not relieve from that principle as to issues which were raised? We submit that there is nothing to justify such construction of the exception.

It is urged in the brief above referred to that the mere absence of a prohibition against suit in a matter which has

already been litigated gives rise to no affirmative right. This is not the situation which exists under the 1926 Act with reference to petitions filed with the Board prior to its passage. We have in Section 283 (b) an express exception from a prohibition, which prohibition is made applicable to all future cases. This compels the conclusion of the grant of an affirmative right just as if it were expressly stated.

We have construed this statute without reference to the legislative history. We respectfully submit that the language of the statute is too clear to require a consideration of the legislative history. If, however, this Court feels that there is any doubt or ambiguity in the words of the statute this doubt is entirely removed by reference to the report of the Senate Committee which, in reporting Section 283(b) of the Act to the Senate, expressly called attention to the fact that the right to file a claim for refund was sill open after an appeal from the Board's decision to the Circuit Court of Appeals and a review by this Court. The report said:

> "But it should be noted that the taxpayer, despite his appeal to the Board, is not barred from suit for refund. If he takes advantage of the *appeal to the Court it is not likely that he will bring suit for refund after the Supreme Court has decided against him on his appeal from the Board.*"

The Committee would hardly have stated that a taxpayer was "*not likely*" to bring suit for refund, unless it clearly recognized that he had the legal right to sue for refund, notwithstanding the judgment of the Circuit Court of Appeals. It is also clear from the language of the Committee Report that the Committee had in mind the possibility of the same issues which had been tried before the Board being raised in a suit for refund. The decision of the courts on

altogether different issues would not have any great tendency to deter future suits.

4. IF THE CIRCUIT COURT OF APPEAL'S DECISION WERE FINAL IT WOULD IN MANY CASES BE POSSIBLE FOR THE COMMISSIONER OF INTERNAL REVENUE TO DEPRIVE TAXPAYER OF THE RIGHT OF A SUIT UPON CLAIM FOR REFUND IN SPITE OF THE EXPRESS GUARANTEE OF THE REVENUE ACT OF 1926.

In one of the briefs filed with this Court in support of jurisdiction it is admitted that it would not have been fair to deprive the taxpayer who had filed his petition under the 1924 Act of his right to a suit for refund. It was there stated that the *primary purpose* of the Section 283(b) was to permit the taxpayer in this class of cases to exercise his option after the decision by the Board; that is, then to determine whether he preferred to pay the tax and sue for refund or obtain a review in court of the board's decision.

This argument seems to us to overlook the possibility that the Commissioner may himself have the Circuit Court of Appeals review the decision of the Board which may be distasteful to him in certain respects. Section 1001(a) of the 1926 Act gives the Commissioner the same right to a review by the Circuit Court of Appeals as is given to the taxpayer. The taxpayer has no means of preventing the Commissioner seeking such a review. When the Commissioner does secure this review and decision is rendered in favor of the Commissioner and against the taxpayer, will the taxpayer thereby be deprived of the right which Congress took such pains to preserve to him? Or is it to be suggested that the decision of the Circuit Court of Appeals on the review of a decision of the Board of Tax Appeals in a case filed with the Board prior to the 1926 Act is to be final, so as to bar claims or refund, where the appeal is taken by the taxpayer, but is not to be final where the ap-

peal is taken by the Commissioner? We do not believe that anyone would seriously make this suggestion. If the decision of the Circuit Court of Appeals is final in the one case, it is final in the other. If it is final, it lies within the power of the Commissioner in every case where any portion of the decision is against him to render nugatory all the provisions of the Act designed to preserve to the taxpayer his right to file claim for refund and sue thereon.

IV.

CONCLUSION.

It is respectfully submitted in conclusion that Congress clearly provided, in cases of appeal to the Board of Tax Appeals prior to the 1926 Act, that the decision of the Board is not final and that no affirmance of that decision on a review by the Circuit Court of Appeals is final so as to bar claim for refund or suit thereon. There is here presented no case to which the jurisdiction of the Circuit Court of Appeals can extend.

Respectfully submitted,

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FILED
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CHARLES ELMORE CR
CL

NO. 130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

OLD COLONY TRUST COMPANY, ET AL.,
Executors,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Certificate From the United States Circuit Court of Appeals for the First Circuit.

BRIEF AS AMICUS CURIAE BY LEAVE OF THE COURT.

JAMES WALTON,
Amicus Curiae.

Pittsburgh, Penna.,
February 11, 1929.

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IN THE SUPREME COURT OF THE UNITED STATES.

OLD COLONY TRUST COMPANY, ET AL., Executors, v. COMMISSIONER OF INTERNAL REVENUE	October Term, 1928.

Motion for Leave to File Brief as Amicus Curiae.

Comes now, James Walton, Esquire, of Pittsburgh, having received the permission of counsel for the plaintiffs herein, and respectfully moves the court for permission to file a brief as *amicus curiae* in the above cause.

JAMES WALTON.

Pittsburgh, Penna.,
February 11, 1929.

IN THE

Supreme Court of the United States

NO. 130

OCTOBER TERM, 1928.

OLD COLONY TRUST COMPANY, ET AL.,
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BRIEF AS AMICUS CURIAE BY LEAVE OF THE COURT.

I.

IS THERE, AS A MATTER OF LAW, A PETITION FOR REVIEW OF A DECISION OF THE BOARD OF TAX APPEALS OF WHICH AN APPELLATE COURT WILL OR SHOULD TAKE JURISDICTION?

Considering this question we must first determine—

WHAT THE BOARD OF TAX APPEALS IS.

"The statute leaves no room for doubt as to the solemn nature of the function of the Board. It is not merely a newly created higher division of the Bureau or even of the Treasury Department. It is, in the language of the statute, 'an *independent agency*

in the executive branch of the government.' * * * Witnesses are to be heard, and if necessary compelled by subpoena to testify; oaths are to be administered; papers and books introduced in evidence, and depositions taken. These are not the attributes of an administrative office. They give us the picture of a judicial tribunal."

Speech of Hon. Chas. D. Hamel, former president of the Board of Tax Appeals, on Sept. 12, 1924, in Detroit, Mich.

"The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer."

p. 17, Report of Committee on Ways and Means of the House on the Revenue Bill of 1926.

"The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer."

p. 34, Report of Senate Finance Committee on Internal Revenue Bill of 1926.

"It seems to me that the Board is at one of the milestones of its career. It has passed from the chrysalis of being a mere administrative agency of the Treasury Department, and has gotten along the road to its future status as a court, and whether it reaches the maturity of a full fledged butterfly depends wholly I think on the way that it comports itself in the immediate future. I have felt often as I have watched the functioning of the Board in its early stages that it had a little too much of the Bureau of Internal Revenue spirit about it, and I am speaking with full respect for that Bureau."

Extract of speech from Senator David A. Reed of the Senate Finance Committee at the dinner in honor of the members of the United States Board of Tax Appeals at the Willard Hotel, Washington, D. C. on May 26, 1926.

"The Board is an instrument of the Government, established to make inquiries and determinations between a citizen and his government in tax matters."

Chicago Railway Equipment Co. v. Blair, Com., U. S. C. C. A., 7th Circuit, decided July 2, 1927.

"The Board of Tax Appeals is a tribunal of limited jurisdiction, and its powers are strictly confined to those affirmatively vested in it by the Act under which it was enacted. * * * Its power over income tax deficiencies is restricted to the hearing of appeals from determinations made under Section 274."

Appeal of C. L. Green, 2 B. T. A. 149, June 24, 1925.

II.

JURISDICTION OF THE BOARD OF TAX APPEALS.

It is provided by section 274 (b) of the 1926 Act that the Commissioner cannot assess or collect by distraint or proceeding in court an alleged deficiency in tax or any part thereof disallowed by the Board. But nowhere, is there any jurisdiction conferred upon the Board to enforce the payment of any deficiency which it may find. The collection of the deficiency is solely in the hands of the Commissioner. The Board does not render a judgment, nor aid the Commissioner in any way.

The Board may determine an overpayment (sec. 284 (e) of 1926 Act) but is left without jurisdiction and

powerless to enforce such determination. By section 284 (d) (2) provision is specifically made for the bringing of suits by a taxpayer for the recovery of overpayments determined by the Board. So the Board is thus powerless to enforce its decisions of either deficiency due the United States or overpayment due the taxpayer.

Moreover, there are no statutory provisions as to how, by whom and from what funds the Board's determination of overpayments by taxpayers are to be made and met. As in decided contrast, note the specific statutory provision for payment of judgments awarded taxpayers by Federal Courts—

> *Payment of judgments of Court of Claims.*—In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. (R. S. s. 1089; Act Mar. 3, 1863, c. 92, s. 7, 12 Stat. 766).
>
> *Execution not to issue against officers of revenue in cases of probable cause.*—When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so re-

covered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (R. S. s. 989; Act Mar. 3, 1863, c. 76, s. 12, 12 Stat. 741).

III.

BOARD OF TAX APPEALS HAS NO JUDICIAL POWER TO COMPEL THE ATTENDANCE OF WITNESSES.

Nowhere, neither in the 1924, the 1926, or the 1928 Revenue Act, is any power conferred upon the Board of Tax Appeals to compel the attendance of witnesses. It is true that the Board has been given authority to issue subpoenas, (sections 908 and 909 of the Revenue Act of 1926, unchanged in the Revenue Act of 1928). But there is lacking the conferring of the judicial power to punish for contempt if the subpoena is flouted.

> "The Board has no power to punish or fine a person summoned before it or elsewhere by subpoena if he fails to honor such summons."
>
> *Holmes and Brewster's Federal Tax Appeals*, (1927), p. 156.

It is true that section 1114 (a) of the Act of 1926 provides that it shall be a misdemeanor for any person to fail or refuse to supply information "for the purposes of the computation, assessment, or collection of any tax imposed by this act." Observe that it refers exclusively to tax imposed by the Act of 1926. Further, in any event, it is a criminal statute and could only be resorted to by information or indictment, together with a trial by jury in the proper Federal court. How can it be said that any tribunal, unable to compel the attendance of witnesses, is such a court from which there may be an appeal to the respective Circuit Courts of Appeal or the Supreme Court of the United States.

That the Board of Tax Appeals is without power to compel the attendance of witnesses is further confirmed by section 617 (a) of the Act of 1928. In this section specific jurisdiction to compel the attendance of witnesses is conferred upon the respective District Courts of the United States. It is significant that no similar jurisdiction is conferred upon the Board of Tax Appeals.

The history of the case of *Oesterlein Machine Co. v. Blair, Commissioner,* in the Supreme Court of the District of Columbia and in the Court of Appeals of the District of Columbia, (17 Fed. (2d), 663), and in the United States Supreme Court, decided Nov. 21, 1927, illustrates the impotency of the Board of Tax Appeals to compel the attendance of witnesses.

IV.

THE ATTITUDE OF THE FEDERAL COURTS RESPECTING THE EXTENT OF THE JURISDICTION OF THE BOARD OF TAX APPEALS.

In the case of *U. S. ex rel. McCandless v. Board of Tax Appeals,* October 14, 1927, the Supreme Court of the District of Columbia granted a peremptory writ of mandamus commanding the Board to proceed according to law in a number of particulars in which the Court held their actions were illegal. In *Mertz v. Mellon, Blair, Commissioner and Tait, Collector,* January 20, 1928, the same court enjoined the three defendants from attempting to force collection of an alleged deficiency determined by the Board in spite of the inhibition in section 3224 Revised Statutes. Regardless of the merits of these two decisions, they illustrate that the Federal Courts recognize that the Board is not a court proper and at least some distance from it.

V.

THE COMMISSIONER HAS POWER TO WITHHOLD JURISDICTION FROM THE BOARD OF TAX APPEALS.

By section 274 (a) of the 1926 Act, unchanged in the new Act, it is provided that the Board of Tax Appeals may not interfere with the Commissioner if he chooses to proceed under sections 279, 282 or 1001. Section 282 relates to bankruptcy or receivership cases and 1001 refers to cases of failure or neglect of the taxpayer to file a bond on appeal.

But section 279 provides (as very properly must be provided) that the Commissioner may proceed to immediate summary assessment and collection if he "believes that the assessment or collection of a deficiency will be jeopardized by delay". In such event the only way the jurisdiction of the Board can be resurrected is by the taxpayer filing a bond with the Collector "not exceeding double the amount" of the jeopardy assessment. The Commissioner, under this section 279, is given broad power to do just about anything he thinks is necessary. All of this is proper to protect the Government's taxes due. But the point is that it is thus within the power of the Commissioner, who is always one of the parties litigant before the Board, to deprive the Board of jurisdiction any time he chooses, up to the time the Board decides what the deficiency may be, merely by "believing the assessment or collection will be jeopardized by delay." Certainly a tribunal whose jurisdiction is so precarious and is limited by what one of the parties litigant may choose to "believe", is a long way from a court proper.

> "The contention of the plaintiff that, through the filing of a petition with the Board of Tax Appeals within 60 days after notice, he thereby obtained a stay until the final decision of the Board is untenable.

The plain intent and meaning of the provisions of section 274 and section 279 of the Revenue Act of 1926 is that, if a jeopardy assessment is made without notice, the Commissioner shall mail the notice within 60 days after making the assessment; that the taxpayer has 60 days after notice within which to file his petition with the Board of Tax Appeals but the pendency of his petition does not operate as a stay and the only manner in which a stay may be obtained is through filing the bond under section 279 (f) within 10 days after notice."

Abraham Salikoff v. Blakely D. McCaughn, Collector, D. C. E. D. Penna., No. 4265, Jan. 31, 1928.

VI.

WHAT WILL THE SUPREME COURT SAY WHEN ASKED TO REVIEW A DETERMINATION OF THE BOARD OF TAX APPEALS?

The dimensions and limitations of the Board, now fully understood, it will be pointed out what the Supreme Court had done when heretofore asked to take jurisdiction of appeals or petitions for review from tribunals powerless to render enforceable judgments. Without comment the leading case upon the question is cited below.

Act of Mar. 3, 1863, creating Court of Claims,—

The 7th section provides that in all cases of final judgment by the Court of Claims, or, on appeal, when affirmed by the Supreme Court, in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims * * *.

The 14th section provides that no money shall be paid out of the Treasury for any claim passed upon

by the Court of Claims, till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

The existence of this Court (Supreme Court) is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. No appeal is given from its decisions, *nor any power given to the legislative or executive departments* to interfere with its judgments or processes of execution * * *. The jurisdiction and judicial power being vested in the court, (Supreme Court) it proceeded to prescribe its processes and regulate its proceedings according to its own judgment, and *Congress has never attempted to control or interfere with the action of the court in this respect.* * * * Nor can Congress authorize or require this Court (Supreme Court) to express an opinion on a case where its judicial power could not be exercised, and *where its judgment would not be final and conclusive* upon the rights of the parties, and process of execution awarded to carry it into effect. * * *

It is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court *exercising independently* the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court. * * * The court has uniformly refused to take jurisdiction where there was not a court of the United States in existence, in possession of the original record, to which we were authorized by law

to send a mandate to carry into effect the judgment of this court.

Gordon v. U. S. per curiam judgment, Mar. 9, 1865, 69 U. S. 561, opinion by Taney, C. J., is found in 117 U. S. 697, published 1885.

Note—On Mar. 17, 1866 Congress repealed section 14, removing the restricted jurisdiction of the Court of Claims and the restricted appellate jurisdiction of the Supreme Court.

VII.

THE BOARD BY ITS OWN RULES RECOGNIZES THAT IT IS NOT A COURT.

By its rule numbered (2) two, the Board has provided—

"The following classes of persons whom the Board finds, upon consideration of their applications, to be of good moral character and to possess the requisite qualifications to represent others may be admitted to practice before the Board:

(a) Attorneys at law * * *.

(b) Certified public accountants duly qualified under the law of any State or Territory or the District of Columbia."

What does this court say to a proposal to have a direct review by a Circuit Court of Appeals (and ultimately by the U. S. Supreme Court) of questions of law in a proceeding which may not even have been conducted by attorneys at law. What will likely happen to the taxpayers? Granting to certified public accountants full credit for knowledge of the tax laws, how can it be expected that they will know the rules of evidence, legal procedure and how to protect themselves and their client

in the record. The writer now has a case tried before the Board by a most capable certified public accountant. A dreadful miscarriage of justice resulted. But on examination of the record it was found that not one single exception had been taken to the rulings of the Board on the admission and exclusion of evidence or to any other ruling. Thus no petition for review was possible,—there was nothing upon which to base it. What is the Supreme Court going to say when it is asked to take jurisdiction of a case tried by a civilian practitioner?

VIII.

CONCLUSION UNESCAPABLE.

By section 900 of the Revenue Act of 1926 it is specifically provided that

> "the Board of Tax Appeals is hereby continued as an independent agency in the Executive Branch of the Government."

Never, in the history of jurisprudence in this country, has there been such a thing as an appeal or a review direct from a branch of the executive department to a tribunal of exclusive appellate jurisdiction in the judicial department of our government. The only possible way to enforce, or, on the other hand, restrain the act of an executive official, if it be illegal, is by an appropriate procedure in a federal court of primary or original jurisdiction. But, it evidently was neither the design nor intent of Congress in creating the Board of Tax Appeals, to give them any greater jurisdiction than to merely temporarily stay the hand of the Commissioner from enforcing the collection of a tax by distraint and seizure of the taxpayer's property, until a hearing and decision on the merits could be had before the Board. The Board itself concedes this—

> *"The Board was created to give the taxpayer a*

chance to have an open and neutral consideration of his liability for a deficiency before he is required to pay. The harsh rule of payment first and litigation afterwards was sought to be mitigated." * * *

Appeal of Everett Knitting Works, 1 B. T. A. 6, Sept. 9, 1924.

The conclusion is therefore unescapable that no federal court of exclusive appellate jurisdiction can properly and legally entertain an appellate proceeding from this Board.

IX.

THE CONSTITUTION OF THE UNITED STATES READS.

ARTICLE III.

Sec. 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *.

Sec. 3. * * * In all other cases (except cases of original jurisdiction) before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, * * *.

The judicial interpretation of these particular sections of Article III of the Constitution is taken from Volume 11, Federal Statutes Annotated, Second Edition, pages 80, 81, 82 and 83.

"The Supreme Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."

Gordon v. U. S., (1864) 117 U. S. 704 (Appendix).

"The courts have no general supervising power over the proceedings and action of the various administrative departments of government."

Keim v. U. S., (1900) 177 U. S. 293, 20 S. Ct. 574, 44 U. S. (L. ed.) 774, affirming (1898) 33 Ct. Cl. 174.

See also

Georgia v. Stanton, (1867) 6 Wall. 71, 18 U. S. (L. ed.) 721;

Astrom v. Hammond, (1842) 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596.

"*In reviewing the action of the Interstate Commerce Commission*, while the courts may review the question of the power of the commission to make an order in a particular case, they cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon some conception as to whether the administrative power has been wisely exercised."

Interstate Commerce Com. v. Illinois Cent. R. Co., (1910) 215 U. S. 452, 30 S. Ct. 155, 54 U. S. (L. ed.) 280.

"Congress may provide for the review of the action of commissions and boards created by it, exercising only quasi-judicial powers, by the transfer of their proceedings and decisions, *denominated appeals for want of a better term*, to judicial tribunals for examination and determination *de novo*."

Stephens v. Cherokee Nation, (1899) 174 U. S. 477, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041.

"An Act of Congress, in order to carry out the provisions of a treaty, authorized the judgment of the superior courts established at St. Augustine and Pen-

sacola respectively to receive and adjust all claims arising within their respective jurisdictions agreeably to the provisions of the treaty, and by a further special law authorized the district judge of the United States for the northern district of Florida to receive and adjudicate the claims of certain persons. It was held that such a tribunal was not a judicial one and that the Act of Congress did not intend to make it one, nor were the powers exercised by the district judge judicial in their nature, and such a proceeding could not be reviewed by the United States Supreme Court."

U. S. v Ferreira, (1851) 13 How. 48, 14 U. S. (L. ed) 42.

See also

Muskrat v. U. S., (1911) 219 U. S. 346, 31 S. Ct. 250, 55 U. S. (L. ed.) 246.

"The Act of Congress creating the interstate commerce commission has not attempted to confer upon the courts nonjudicial functions. A court is not made, by the Act, the mere executioner of the Commissioners' order or recommendation so as to impose upon the court a nonjudicial power. A suit is, under the provisions of the Act, an original and independent proceeding in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo,* upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. 614.

X.

THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS OVER ORDERS OF THE FEDERAL TRADE COMMISSION, INTERSTATE COMMERCE COMMISSION AND FEDERAL RESERVE BOARD AS CONTRASTED WITH NO MENTION OF THE BOARD OF TAX APPEALS.

By the Act of February 13, 1925 (note that this more than eight months after Congress created the Board of Tax Appeals), the Judicial Code was amended to read as follows:

> "(e) The Circuit Courts of Appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914."
>
> *Sec. 128, J. C.* par fifth.

The significant part of this is nothing is said concerning any jurisdiction over the Board of Tax Appeals. Obviously, if particular and special legislation is necessary to confer appellate jurisdiction on the Circuit Court of Appeals to enforce, set aside or modify the orders of the Commissions and Boards named in this section 128, fifth (e), a similar particular and special act of Congress would be necessary to vest the Circuit Court of Appeals with appellate jurisdiction over the Board of Tax Appeals. This seems too plain for argument.

In contrast, note the correlated section of the Revenue Act of 1926—

> "Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.
>
> (b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

The significant thing is the omission of the word "enforce" and the further words "set aside". Perhaps this might be explained by saying that since the Board of Tax Appeals is powerless to enforce its own orders and determinations, it must follow per force that the appellate body above the Board of Tax Appeals would likewise be impotent to enforce its determinations.

XI.

NO CHANGE OF VENUE FROM THE BOARD OF TAX APPEALS.

Another most serious objection to the constitutionality of the acts and the enforcement of the determinations of the Board of Tax Appeals is the fact that some (12) twelve of the (16) sixteen members were former employees of the Bureau of Internal Revenue. And the Commissioner of Internal Revenue, the head of the Bureau, is always one of the parties litigant before the Board. There is no pro-

vision for a change of venue. It seems to be possible for a taxpayer to be required to try a case before a Board member (only one member hears cases except in extraordinary cases) who previously has ruled against the taxpayer while in the employ of the Commissioner. Certainly such a thing would nullify the action of a regularly constituted court. Moreover, it is a most cogent objection, especially when it is considered that the statute seems to contemplate that the review of Circuit Courts of Appeal shall be confined to questions of law, as held in *Avery v. Blair, Commissioner,* 5th C. C. A., Nov. 1, 1927, 22 Fed. (2nd) 6.

XII.

FAR FROM BEING A COURT.

It cannot be contended that, by the creation and continuance of the Board of Tax Appeals, Congress created, or intended to create a court. On the contrary, Congress expressly places the Board under the executive department of the government. The only party who is permitted to appeal is the complaining taxpayer and the only adverse party is the Commissioner. The Board cannot order or even consider the advisability of making others parties to the proceedings before it, and whose absence might, under a given state of facts, cause an entirely different decision to be made. Compare *Shield v. Barrow,* 7 How. 130. The Board cannot issue any equitable writs necessary to do complete justice; it cannot order an accounting; it cannot martial assets; it cannot cancel deeds or other written instruments, the cancellation of which may be absolutely necessary to complete justice. In short, it can in no way function as a court either of law or equity. Yet it is now proposed that there may be an appeal or petition for review,—call it what you like,—direct from this executive agency in the government to an appellate court in the

judicial department. The one single solitary function of this Board is to determine the correct amount of the tax, and not one step beyond that can it go. It gives the Commissioner no aid in collection, nor does it give the taxpayer any aid if it determines a refund.

XIII.

ALREADY THE SUPREME COURT HAS MADE A STRONG INTIMATION OF ITS VIEWPOINT.

While this court has not said so in so many words, the language used in the case of *Williamsport Wire Rope Company v. United States,* number 337, October 1927 Term, decided June 4, 1928, 277 U. S. 551, strongly impels the conclusion that the United States Board of Tax Appeals is recognized to be nothing more than a branch of the executive department of the government. For convenience, the relevant portion of that decision is cited as follows—

> It is true that, unlike the Committee (on appeals and review) the Board of Tax Appeals is not a part of the Bureau of Internal Revenue. The Board is an independent agency. But by specific provision of the Revenue Act of 1924, c. 234, No. 900 (k), 43 Stat. 253, 338, it was defined as an agency "in the executive branch of the Government." Compare *Goldsmith v. Board of Tax Appeals,* 270 U. S. 117, 121-122. *Its sole function* consists in reviewing, on appeal, determinations of the Commissioner under the revenue laws. The fact that the Commissioner is a party to all cases before it enables the Board, by rules of procedure which it has developed, to leave to the Commissioner the initial determination of many questions requiring the use of facts not in the record. Its limited, specialized functions enable its members to acquire the extensive special knowledge and the specific experience essential to a sound exercise of judgment in dealing

with questions arising under Nos. 327 and 328. As was said in the *Oesterlein case, supra,* at p. 226, there is no reason for thinking that Congress considered the Commissioner to be better qualified for making determinations under Nos. 327 and 328 than this administrative agency specially established to review his decisions.

XIV.

TO ASSUME JURISDICTION WILL MAKE THE DECISIONS OF THIS COURT UTTERLY IRRECONCILABLE.

In *Blair, Commissioner v. Oesterlein Machine Company,* 275 U. S. 220, (1927), this court said, in effect that the Board of Tax Appeals did have jurisdiction to hear an appeal from the determination of the Commissioner under Sections 327 and 328 of the 1918 Revenue Act. In *Williamsport Wire Rope Company v. United States,* (1928), 277 U. S. 551, this court affirmed that conclusion but went on to say that a federal court had no jurisdiction in such cases whatsoever, since determinations under these particular sections were discretionary with the Commissioner, subject only to an appeal to the Board. If that be true, how, then, can there be a review by an appellate federal court of a decision by the Board of Tax Appeals in a case involving sections 327 and 328. The reasoning of this court for lack of jurisdiction in Williamsport will apply with equal force and effectiveness when a case like Oesterlein, for instance, comes before it by way of the Board of Tax Appeals. And if there can be no review by this court from a decision of the Board in a section 327 and 328 case. how can there be a distinction made in cases involving other sections of the Revenue Acts. The statute makes no distinction whatsoever.

XV.

All that has been said heretofore applies with equal relevancy to cases which were appealed to the Board under either the 1924 Act or the 1926 Act. But the two acts are distinctly different. Sections 283 (b) and 283 (f) (set forth on pages 7 and 8 of the Solicitor General's brief) of the 1924 Act, specifically provide that a taxpayer's right to pay and then institute suit to recover shall not be forfeited by an appeal to the Board. And it has twice been so interpreted by the District Courts,—first, in *Emery v. U. S.*, 27 F. (2nd) 992, (one of the writer's cases) and again in *Old Colony R. Co. v. U. S.*, 27 F. (2nd) 994, (Mass.). So, if this court takes jurisdiction and decides the issues herein, the taxpayer will then pay his tax, institute suit for recovery and, with a jury trial, the result might easily be the converse. And further, this same identical case might thus come to this court a second time under a record upon which the former decision would have to be reversed.

XVI.

ON THE SUBJECT OF CONFUSION AND EXPEDIENCY.

In the brief of the learned Committee of the American Bar Association, it is pointed out that a denial of jurisdiction will result in much confusion and that present results have been satisfactory (p. 5). Consider then for a moment what is happening right now in our courts,—what actually did happen in the *Emery v. U. S.* case, cited *supra*. The taxpayer claimed a refund and the Commissioner claimed additional tax. The taxpayer instituted suit in the District Court for his refund and the Commissioner concurrently determined a deficiency of a vast amount of additional tax. From this determination of the Commissioner the taxpayer appealed to the Board of Tax Appeals, which

eventually held there was no additional tax due. Thereupon the taxpayer renewed his suit for refund in the District Court and was awarded a judgment. The Commissioner's counsel did not appeal therefrom, but subsequently did file a petition for review of the decision of the Board of Tax Appeals in the Circuit Court of Appeals for the Third Circuit. Thus we have the same controversy pending in two different courts with a possibility that one court may be obliged to decide one way and the other court, with an utterly different record before it, will be obliged to decide the other way. And the Third Circuit Court of Appeals might find itself in the anomalous position of having to decide the suit for refund, when it is reached, entirely opposite to the decision on appeal from the Board of Tax Appeals. Shall we say that such a result is satisfactory? And could there be greater confusion and chaos?

Respectfully submitted,

JAMES WALTON,

Amicus Curiae by leave of the Court.

Pittsburgh, Penna.,
February 11, 1929.

SUPREME COURT OF THE UNITED STATES.

No. 129.—October Term, 1928.

The United States of America, *vs.* Boston & Maine Railroad.	On Certificate from the United States Circuit Court of Appeals for the First Circuit.

[June 3, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

As indicated in *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* No. 130, just decided, this case comes here by certificate from the Circuit Court of Appeals for the First Circuit and on the following statement:

"This action is brought by the Boston & Maine Railroad to recover income taxes for the year 1917, claimed to have been erroneously collected. In the District Court [for the District of Massachusetts] the plaintiff recovered a judgment for the full amount of its demand—$3,920.55 and interest.

"June 30, 1900, the Fitchburg Railroad Company leased all its railroad and property of every description to the Boston & Maine Railroad for the term of ninety-nine years. In the lease the lessee covenanted to pay specified rentals, to maintain and replace the leased properties in manner indicated, to pay all operating expenses, and to pay 'all taxes of every description, Federal, State, and municipal, upon the lessor's property, business, indebtedness, income, franchises, or capital stock, or said rental,' and to pay divers other charges. In 1918 an income-tax return, under the provisions of the revenue acts of 1916 and 1917, was filed on behalf of the Fitchburg Railroad Company for the calendar year 1917, upon which taxes amounting to $61,422.06 were assessed. These taxes were paid to the Commissioner of Internal Revenue by the Boston & Maine Railroad pursuant to the term of the lease. The Fitchburg Railroad Company was consolidated with the Boston & Maine Railroad in 1919.

"In 1921 the Commissioner of Internal Revenue assessed an additional income tax against the Fitchburg Railroad Company of $3,920.55. In doing this he treated the payment of $61,422.06 made by the Boston & Maine Railroad to the collector of internal revenue as additional taxable income to the Fitchburg Railroad Company

to the extent of $65,342.61. This additional tax of $3,920.55 was paid to the collector of internal revenue by the Boston & Maine Railroad in July, 1921.

"The claim for refund of this additional tax was duly filed with the Commissioner of Internal Revenue, but was never formally acted upon, and more than six months having elapsed after it was filed, this action was brought for the recovery of the tax so paid [under par. 20, Section 24 of the Judicial Code, as amended by Sec. 1310(c), c. 136, 42 Stat. 310]."

The judgment of the District Court was appealed to the Circuit Court of Appeals for the First Circuit, and upon the facts recited, and under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, the Court of Appeals has asked the instruction of the Supreme Court upon the following question:

"Did the payment by the lessee of the net income taxes assessable against the lessor constitute additional taxable income to such lessor?"

The merits of this case must be disposed of in accord with the rule already laid down in the *Old Colony* case just decided. Like that, it is one in which the lessee has paid to the Government the taxes due under the law from the lessor. The payment is made in accord with the contract of lease, and is merely a short cut whereby that which the lessee specifically agreed to pay as part of the rental effects that payment by discharging the obligation of the lessor to pay the tax to the Government.

Our conclusion is in accordance with the practice of the Department. Treasury Decision 2620 (19 Treas. Dec. 411). In answer to a question suggested by this Court, the Commissioner states in the appendix to the Government's brief on reargument in No. 130, that it has been the uniform practice to treat taxes paid, where by agreement between the parties the tax laid upon the income actually received by one of them has been paid by the other. He refers to the decision of the Circuit Court of Appeals for the First Circuit in the case of *West End Railway Co.* v. *Malley*, 246 Fed. 625, where the dividends paid by a lessee corporation directly to the stockholders of the lessor corporation were held to be income to the lessor under the Revenue Act of October 3, 1913. It was carried into Regulation 33, promulgated January 2, 1918, as Article 102, reading as follows:

"Art. 102. Leased properties.—When a corporation shall have leased its property in consideration that the lessee shall pay in lieu of rental an amount equivalent to a certain rate of dividends on its capital stock or the interest on its outstanding indebtedness, together with taxes, insurance, or other fixed charges, such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee direct to the stockholders and bondholders of the lessor. The lessee, in making these payments direct to the bondholders and the stockholders, does so as the agent of the lessor, and the latter is none the less liable to return the amounts thus paid as income and to pay any tax that may be due thereon."

Article 102 of Regulations 33 has been substantially embodied in all subsequent regulations as Article 546, of Regulations 45, Article 547 of Regulations 62, 65 and 69, and Article 70 of Regulations 74, promulgated under the Revenue Acts of 1918, 1921, 1924, 1926 and 1928, respectively.

Article 109 of Regulations 45, promulgated January 28, 1921, reads as follows:

"Taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter."

This provision is also found in Article 109 of Regulations 62, Article 110 of Regulations 65 and 69, and Article 130 of Regulations 74.

In addition to the foregoing general provisions, a specific ruling on this question was published in May, 1920, as A. R. M., 16, C. B. 2, page 62. The facts in that case are stated by the Commissioner as follows:

"A contract was entered into in July, 1917, between the P Company and the M Company, whereby the latter agreed to sell certain goods on a cost-plus basis. It was provided that the P Company should pay Federal taxes assessed on the profits accrued from this contract to the M Company. Performance under the contract was made by the M Company during 1918. In October, 1918, the P Company closed its books upon an accrual basis and made no provision for any taxes arising out of the contract. It was there held that the amount of taxes of the M Company paid by the P Company was income to the M Company for the year for which such payment was made. This ruling was followed not only in the case

in which rendered, but also as a precedent in all other similar cases."

The Commissioner says that no single instance has been found where the Bureau has departed from this general practice of construing taxes paid under the present circumstances to be income to the taxpayer whose tax liability has been discharged in such a manner.

The Commissioner says that it was the purpose of the instructions to establish a consistent policy, and that if they have not been followed in individual cases, it is due to an unauthorized departure from the Bureau's instructions. More than this, it should be added that neither before nor since 1923 has any algebraic formula been used by the Bureau in computing taxes.

Not only, therefore, is the conclusion that the question must be answered "Yes" sustained by the practice of the Department under all of the Revenue Acts, but the cases cited in the *Old Colony* case require the same view.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 130.—October Term, 1928.

Old Colony Trust Company, et al., Executors, *vs.* Commissioner of Internal Revenue.	On Certificate from the United States Circuit Court of Appeals for the First Circuit.

[June 3, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

We have before us for consideration two questions certified from the same Circuit Court of Appeals, No. 130 and No. 129. They are presented upon different statements of facts and the cases reach the certifying court in different ways, but the questions are so nearly alike that the certifying judges deemed it convenient to present them in consolidated form. We prefer to separate the questions, discuss and decide No. 130 first, and then consider No. 129.

No. 130 comes here by certificate from the Circuit Court of Appeals for the First Circuit. The action in that court was begun by a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, before Mr. Wood's death, the Commissioner of Internal Revenue notified him by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The deficiency was revised by the Commissioner August 18, 1925. An appeal was taken to the Board of Tax Appeals, which was filed October 27, 1925. A hearing before the Board, April 11, 1927, resulted in a decision November 12, 1927. The Board approved the action of the Commissioner and found a deficiency in the federal income tax return of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review was perfected December 23, 1927, pursuant to the Revenue Act of 1926, Sec. 283(j), and Secs.

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1001 to 1005, c. 27, 44 Stat. 9, 65, 109, and Rule 38 of the First Circuit Court of Appeals.

The facts certified to us are substantially as follows:

William M. Wood was president of the American Woolen Company during the years 1918, 1919 and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.87, which he included in his return for 1919.

August 3, 1916, the American Woolen Company had adopted the following resolution, which was in effect in 1919 and 1920:

"Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines, and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation."

This resolution was amended on March 25, 1918, as follows:

"Voted: That, referring to the vote passed by this board on August 3, 1916, in reference to income taxes, State and Federal, payable upon the salaries or compensation of the officers and certain employees of this company, the method of computing said taxes shall be as follows, viz:

" 'The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company.' "

Pursuant to these resolutions, the American Woolen Company paid to the collector of internal revenue Mr. Wood's federal income and surtaxes due to salary and commissions paid him by the company, as follows:

Taxes for 1918 paid in 1919.....	$681,169.88
Taxes for 1919 paid in 1920.....	351,179.27

The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920.

The question certified by the Circuit Court of Appeals for answer by this Court is:

"Did the payment by the employer of the income taxes assessable against the employee constitute additional taxable income to such employee?"

The first point presented to us is that of the jurisdiction of this Court to answer the question of law certified. It requires us to examine the original statute providing for the Board of Tax Appeals under the Revenue Act of 1924, and the amending Act of 1926.

The Board of Tax Appeals, established by Section 900 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment. The Board's duty under the Act of 1924 was to hear, consider and decide whether deficiencies reported by the Commissioner were right.

Section 273 of that Act defined a "deficiency" to be the the amount by which the tax imposed exceeded the amount shown by the return of the taxpayer after the return was increased by the amounts previously assessed or disallowed. There was under the Act of 1924 no direct judicial review of the proceedings before the Board of Tax Appeals. But each party had the unhindered right to seek separate action by a court of competent jurisdiction to test the correctness of the Board's action. Such court proceedings were to be begun within one year after the final decision of the Board.

Section 274 (b) provided that if the Board determined there was a deficiency, the amount so determined should be assessed and paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner, but disallowed as a deficiency by the Board, could be assessed, but the Commissioner was at liberty, notwithstanding the decision of the Board against him, to bring a suit in a proper court against the taxpayer to collect the alleged deficiency.

On the other hand, by Section 900 (g) it was provided that in any suit brought by the Commissioner, or by the taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board were *prima facie* evidence of the facts.

By the Revenue Act of 1926, this procedure was changed and a direct judicial review of the Board's decision was substituted.

The Act of 1926 also enlarged the original jurisdiction of the Board of Tax Appeals to consider deficiencies beyond those shown in the Commissioner's notice, if the Commissioner made such a claim at or before the hearing (Section 274(e)), and also to determine that the taxpayer not only did not owe the tax but had over paid (Section 284 (e)).

The chief change made by the Act of 1926 was the provision for direct judicial review of the Board's decisions by the filing by the Commissioner or the taxpayer of a petition for review in a Circuit Court of Appeals or the Court of Appeals of the District of Columbia under rules adopted by such courts.

It is suggested that the proceedings before the Circuit Courts of Appeals or the District Court of Appeals on a petition to review are and can not be judicial, for they involve "no case or controversy," and without this a Circuit Court of Appeals, which is a constitutional court (*Ex parte Bakelite Corporation,* No. 17, Original, decided May 20, 1929) is incapable of exercising its judicial function. This view of the nature of the proceedings we can not sustain.

The case is analogous to the suits which are lodged in the Circuit Courts of Appeals upon petition or finding of an executive or administrative tribunal. It is not important whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law. The jurisdiction in this cause is quite like that of Circuit Courts of Appeals in review of orders of the Federal Trade Commission. *Federal Trade Commission* v. *Eastman,* 274 U. S. 623; *Silver Co.* v. *Federal Trade Commission,* 292 Fed. 752. There are other instances of a like kind which can be cited. *United States* v. *Ritchie,* 17 How. 525, 534; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 469; *Stephens* v. *Cherokee Nation,* 174 U. S. 445,

477. See also *Fong Yue Ting* v. *United States,* 149 U. S. 698, 714.

It is not necessary that the proceeding to be judicial should be one entirely *de novo.* It is enough that before the judgment which must be final has been invoked as an exercise of judicial power, it shall have certain necessary features. What these are has been often declared by this Court. Perhaps the most comprehensive definitions of them are set forth in *Muskrat* v. *United States,* 219 U. S. 346, 356, where this Court entered into the inquiry what was the exercise of judicial power as conferred by the Constitution. There was cited there a definition by Mr. Justice Field, in *Re Pacific Railway Commission,* 32 Fed. 241, 255, which has been generally accepted as accurate. He said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter; and includes only suits of a civil nature. Chisholm *v.* Georgia, 2 Dall. 431, 432; 1 Tuch. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

In *Osborn* v. *United States Bank,* 9 Wheat. 738, Chief Justice Marshall construed Article III of the Constitution as follows (p. 819):

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the *Bakelite* case, *supra,* and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

In the case we have here, there are adverse parties. The United States or its authorized official sues to establish its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject matter of the controversy is the amount of the tax claimed to be due or refundable and its validity, and the judgment to be rendered is a judicial judgment.

The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.

It is next suggested that there is no adequate finality provided in respect to the action of these courts. In the first place, it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced. A judgment is sometimes regarded as properly enforceable through the executive departments instead of through an award of execution by this Court, where the effect of the judgment is to establish the duty of the department to enforce it. *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 457, 461. The case of *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S. 123, 132, shows clearly that there are instances where the award of execution is not an indispensable element of a constitutional case or controversy. In that decision there are collected familiar examples of judicial proceedings resulting in a final adjudication of the rights of litigants without it.

But even if a formal execution be required, we think power to resort to it is clearly shown with respect to the enforcement of the action of the courts here involved by Sections 1001 to 1005.

By the first, the decision of the Board of Tax Appeals rendered after the passage of the Act of 1926 may be reviewed by the Circuit Court of Appeals or the District Court of Appeals if a peti-

tion for such review is filed either by the Commissioner or the taxpayer within six months after the decision is rendered. The courts are to adopt rules for the filing of the petition, the preparation of the record, and the conduct of the proceedings upon such review. The review is not to operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board, unless a petition for review is filed by the taxpayer, or unless the taxpayer has filed a so-called jeopardy bond which when enforced will operate finally to settle the rights of the parties as found by the courts.

By Section 1002, it is provided in what venue the decision may be reviewed. In Section 1003, the Circuit Courts of Appeals and the Court of Appeals of the District are given exclusive jurisdiction to review the decisions of the Board and it is declared that their judgments shall be final except that they shall be subject to review by the Supreme Court of the United States, on certificate or by certiorari in the manner provided in Section 240 of the Judicial Code as amended, and in such review the courts shall have the power to affirm, or if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board, with or without remanding the case for a rehearing as justice may require.

By Section 1004, the same courts are given power to impose damages in any case where the decision of the Board is affirmed, and it appears that the petition was filed merely for delay.

By Section 1005, the decision of the Board is to become final in respect to all the numerous instances which in the course of the review may naturally end further litigation. In the provisions of these sections, the legislation prescribes minute details for the enforcement of the judgments that are the result of these petitions for review in the several courts vested with jurisdiction over them. The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest and demonstrates the unsoundness of the objection.

We have before us, however, for actual inquiry a case different from one just considered in the regular course of a petition for review of a decision of the Board, begun and decided all after the enactment of the Act of 1926. It is one in which the appeal to the Board of Tax Appeals had been taken, but the appeal had not

been decided by the Board before the passage of the Act of 1926. That presents what involves a troublesome exception or duplication in the procedure. This occurs because of the last excepting clause of Section 283 (b) of the amending Act of 1926, which is as follows:

"If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 . . . and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of Section 284."

The provisions of Section 284(d) are those which deny to the taxpayer the power to bring any suit against the United States for the recovery of the tax after he has adopted the procedure of appealing to the Board of Tax Appeals or to the Circuit Court of Appeals.

By this last exception in 283 (b), there seems still open to the taxpayers who have filed a petition under the law of 1924 and have not had a decision by the Board before the enactment of the law of 1926, the right to pay the tax and sue for a refund in the proper District Court (Par. 20 of Section 24 of the Judicial Code, as amended by Sec. 1310 (c), c. 136, 42 Stat. 311, U. S. Code, Title 28, Sec. 41). *Emery* v. *United States,* 27 F. (2d) 992, and *Old Colony R. R.* v. *United States,* 27 F. (2d) 994, hold that the petitioner still retains this earlier remedy.

The truth seems to be that in making provision to render conclusive judgments on petitions for review in the Circuit Courts of Appeals, Congress was not willing in cases where the Board of Tax Appeals had not decided the issue before the passage of the Act of 1926, to cut off the taxpayer from paying the tax and suing for a refund in the proper District Court. But the apparent conflict in such cases can be easily resolved by the use of the principles of *res judicata.* If both remedies are pursued, the one in a District Court for refund, and the other on a petition for review

in the Circuit Court of Appeals, the judgment which is first rendered will then put an end to the questions involved and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment. There is no reason, therefore, in the case before us to decline to take jurisdiction. See *Bryar* v. *Campbell*, 177 U. S. 649; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 230; *Stanton* v. *Embrey*, 93 U. S. 548, 554.

Second. The jurisdiction here is based upon the certificate of a question of law. That is whether the payment by the employer of the income taxes assessed against the employee constitutes additional returnable taxable income to such employee. The certification of such a question by the Circuit Court of Appeals is an invocation of the appellate jurisdiction of this Court and therefore within the Constitution.

Third. Coming now to the merits of this case, we think the question presented is whether a taxpayer having induced a third person to pay his income tax or having acquiesced in such payment as made in discharge of an obligation to him may avoid the making of a return thereof and the payment of a corresponding tax. We think he may not do so. The payment of the tax by the employers was in consideration of the services rendered by the employee and was a gain derived by the employee from his labor. The form of the payment is expressly declared to make no difference (Section 213, Revenue Act of 1918, c. 18, 40 Stat. 1065). It is therefore immaterial that the taxes were directly paid over to the Government. The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed. The certificate shows that the taxes were imposed upon the employee, that the taxes were actually paid by him and that the employee entered upon his duties in the years in question under the express agreement that his income taxes would be paid by his employer. This is evidenced by the terms of the resolution passed August 3, 1916, more than one year prior to the year in which the taxes were imposed. The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore that the payment constituted income to the employee.

This result is sustained by many decisions. *Providence & Worcester R. R. Co.*, 5 B. T. A. 1186; *Houston Belt & Terminal Ry.*

Co. v. *Commissioner*, 6 B. T. A. 1364; *West End Street Railway Co.* v. *Malley*, 246 Fed. 625; *Rennselaer & S. R. Co.* v. *Irwin*, 249 Fed. 726; *Northern R. Co. of New Jersey* v. *Lowe*, 250 Fed. 856; *Houston Belt & Terminal Ry. Co.* v. *United States*, 250 Fed. 1; *Blalock* v. *Georgia Ry. & Electric Co.*, 246 Fed. 387; *Hamilton* v. *Kentucky & Indiana Terminal R. R.*, 289 Fed. 20; *American Telegraph & Cable Co.* v. *United States*, 61 Ct. Cl. 326; *United States* v. *Western Union Telegraph Co.*, 19 Fed. (2d) 157; *Estate of Levalley*, 191 Wis. 356; *Estate of Irwin*, 196 Cal. 366.

Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute. This is shown by the case of *Noel* v. *Parrott*, 15 F. (2d) 669. There it was resolved that a gratuitous appropriation equal in amount to $3 per share on the outstanding stock of the company be set aside out of the assets for distribution to certain officers and employees of the company and that the executive committee be authorized to make such distribution as they deemed wise and proper. The executive committee gave $35,000 to be paid to the plaintiff taxpayer. The court said, p. 672:

"In no view of the evidence, therefore, can the $35,000 be regarded as a gift. It was either compensation for services rendered, or a gain or profit derived from the sale of the stock of the corporation, or both; and, in any view, it was taxable as income."

It is next argued against the payment of this tax that if these payments by the employer constitute income to the employee, the employee will be called upon to pay the tax imposed upon this additional income, and that the payment of the additional tax will create further income which will in turn be subject to tax, with the result that there would be a tax upon a tax. This it is urged is the result of the Government's theory, when carried to its logical conclusion, and results in an absurdity which Congress could not have contemplated.

In the first place, no attempt has been made by the Treasury to collect further taxes, upon the theory that the payment of the additional taxes creates further income, and the question of a tax upon a tax was not before the Circuit Court of Appeals and has not been certified to this Court. We can settle questions of that sort when

an attempt to impose a tax upon a tax is undertaken but not now. *United States* v. *Sullivan*, 274 U. S. 259, 264; *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219. It is not, therefore, necessary to answer the argument based upon an algebraic formula to reach the amount of taxes due. The question in this case is, "Did the payment by the employer of the income taxes assessable against the employee constitute additional taxable income to such employee?" The answer must be "Yes."

Separate opinion of Mr. Justice McReynolds.

The Board of Tax Appeals belongs to the executive department of the government and performs administrative functions—the assessment of taxes. The statute attempts to grant a broad appeal to the courts and directs them to reconsider the Board's action—to do or to say what it should have done. This enjoins the use of executive power, not judicial. The duty thus imposed upon the courts is wholly different from that which arises upon the filing of a petition to annul or enforce the action of the Interstate Commerce Commission or the Federal Trade Commission.

I think the Circuit Court of Appeals was without jurisdiction.